Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

WILLIAM C. MARTIN,

Petitioner,

vs.

VICTOR BAUGH, individually and in his official capacity,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Mr. William Martin is an employee of the City of Birmingham who seeks to hold his supervisor, a Mr. Victor Baugh, liable for Baugh's harassment of Martin in retaliation for Martin's disclosure to a city councilman that City officials were violating bid laws. The following questions are presented in the context of Baugh's motion for summary judgment:

1. Whether the Eleventh Circuit applied an improper legal standard with regard to the use of legal precedents in determining whether Martin's speech was protected, in conflict with applicable decisions of this Court?

2. Whether the Eleventh Circuit applied an improper standard with regard to the reasonable person analysis in determining whether Martin's speech was protected, in conflict with applicable decisions of this Court?

3. Whether the Eleventh Circuit improperly inserted a balancing analysis into the determination whether Martin's speech was protected, in conflict with applicable decisions of this Court, and also of the Ninth Circuit?

4. Whether the Eleventh Circuit has improperly heightened the burden on plaintiffs making claims arising from the violation of their freedom of speech, in conflict with applicable decisions of this Court?

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Petitioner, William Martin, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals, dated April 28, 1998, is reproduced as Appendix A and the memorandum opinion of the district court, dated January 18, 1996 is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed is the decision of the Eleventh Circuit reversing the district court's denial of the motion for summary judgment of Victor Baugh, and directing the district court to grant Baugh qualified immunity. The Eleventh Circuit's judgment was entered April 28, 1998.

The petition for rehearing was denied on August 7, 1998. (Appendix E).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, Amendment 1.

> Congress shall make no law . . . abridging the freedom of speech. . . .

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On February 15, 1995 Mr. William C. Martin ("Martin") filed his original complaint against the City of Birmingham and its mayor, Mr. Richard Arrington, alleging violation of his rights under the freedom of speech clause of the first amendment to the Constitution the United States, and also 42 U.S.C. § 1983, for violation of his constitutional right. On or about April 14, 1995 Martin served his first amended complaint, adding as a defendant his supervisor, the director of communications for the City of Birmingham, Mr. Victor Baugh ("Baugh"). Martin alleged that Baugh also had violated Martin's constitutional right of free speech, and sought redress from Baugh individually and in his official capacity pursuant to 42 U.S.C. § 1983.

Martin's case arises in the context of another related case arising from the violation of competitive bid laws by the City. *See Ericsson GE v. Motorola*, 120 F.3d 216 (11th Cir.), *reh'g denied*, 130 F.3d 446 (1997). Martin was a communications technician employed by the City and provided technical expertise and analysis of the City's public safety communications systems (the "system" for use by public safety

officers like police, etc.). App. A at 2a. In 1993, the City proposed to purchase a new communications system, and received bids from General Electric ("GE") and from Motorola. These bids were at or more than $10,000,000 each. Memorandum Opinion of Hon. William Acker, entered June 1, 1995. A committee evaluated the bids, and recommend that the City purchase the GE system. *Id.* The City responded by rejecting all the bids, and then entering exclusive negotiations with Motorola. App. A at 3a. Based upon his expertise, Martin concluded that the Motorola system was inferior, and that the selection process was being manipulated improperly to favor Motorola. App. A at 3a. Motorola was indeed found guilty of actual undue or improper influence by an advisory jury empaneled by Hon. William Acker, the district court judge in the *Ericsson* case. App. C at 14a.

Martin first reported his findings regarding the inferiority of the Motorola system and the manipulation of the bid process to Baugh. Memorandum Opinion of Hon. William Acker, entered June 1, 1995. Martin concluded that Baugh was not correcting the improper procurement of the Motorola system, however. Martin then communicated with Mr. Jimmy Blake, a councilman for the City of Birmingham, and also with representatives of the Birmingham Fraternal Order of Police. App. A at 3a. Blake then objected to the purchase of the Motorola system at meetings of the City council.

Baugh learned of Martin's communications with Blake and with the FOP. Baugh then began a campaign of harassment against Martin, both by undermining the conditions of his employment, and by repeated personal and emotional confrontations. This harassment was undertaken in retaliation for Martin's communications with Mr. Blake and with the FOP. As a result, Martin suffered from severe depression, and upon the advice of his physician, he took a leave of absence from his

employment with the City. App. A at 4a. Martin's action against Baugh, in his individual capacity, is based upon this retaliation.

Baugh moved for summary judgment, asserting that he was entitled to qualified immunity from Martin's suit. The district court denied the motion. The district court's decision was based upon both the materials submitted on the motion by the parties, and also upon the court's taking notice of the testimony and the verdict in the *Ericsson* case. The district court held that the pertinent law was "clearly established" that Martin's speech to Blake and to the FOP was protected, and therefore Baugh was not entitled to qualified immunity.

Baugh noticed his interlocutory appeal to this denial of his motion. On appeal, the Eleventh Circuit ("Circuit Court") reversed and directed the district court to grant Baugh the qualified immunity from Martin's suit. This decision has been published.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE ELEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN *UNITED STATES v. LANIER*

In *United States v. Lanier*, 117 S. Ct. 1219 (1997) this Court provided guidance as to: (a) the use of legal precedent in putting public officials on notice of the constitutional rights of others in the context of protected speech, and also as to (b) the scope of a reasonable person's notice of the constitutional rights of others. The decision of the Circuit Court in Martin's case, entered a year after *Lanier* was published, is in conflict with *Lanier* on both counts.

A. The Circuit Court's decision is in conflict with the reasonable notice standard in *Lanier*.

First of all, the Circuit Court's decision is in conflict with *Lanier's* standard for the use of precedent in giving notice or fair warning to public officials. In *Lanier*, the Sixth Circuit had used a very restrictive standard for finding that a public officer was on notice of a person's constitutional rights, holding that notice of criminal liability was given only by a decision of this Court, and only when the decision had applied the constitutional right in "a factual situation fundamentally similar to the one at bar." 117 S. Ct. at 1223. The Sixth Circuit found no decision "fundamentally similar" to the rapes made the basis of *Lanier*, and thus reversed a conviction for those rapes. *Id.*

The Court vacated this decision, and remanded with instructions to apply the proper standard. With regard to the use of precedent, in the context of qualified immunity, the Court wrote that the law

> seeks to ensure that defendants "reasonably can anticipate when their conduct may give rise to liability," . . . by attaching liability only if "[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."

117 S. Ct. at 1227. This Court also concluded that the standard of "clearly established" in the qualified immunity context is the same as the "fair warning" in the criminal liability context. *Id.* Thus, the Court's analysis of fair warning also applies to qualified immunity. Regarding fair warning, the Court held that precedent need not be "fundamentally similar" to give notice, and especially not similar to the extent that idea was used by the Sixth Circuit. *Id.* The Court showed that it had upheld

convictions for violation of constitutional rights "despite notable factual distinctions" between precedents and the case at bar, "so long as the prior decisions gave reasonable warning" of criminal liability. The Court emphasized this statement by referring to *United States v. Guest*, 383 U.S. 745 (1966), and *United States v. Saylor*, 322 U.S. 385 (1944), where considerable leaps were made from the precedent to the criminal liability. Finally, the Court wrote that

> In sum, as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, "in light of pre-existing law the unlawfulness [under the Constitution is] apparent."

117 S. Ct. at 1228.

Martin wishes to emphasize this Court's careful choice of words in this passage that guides the application of the reasonableness test described earlier in *Lanier*. Defendants are on notice if liability is *apparent*, and *in light* of precedent. This is *all that can usefully be said* about reasonableness. These words state firmly and clearly that the reasonableness test must be applied by defendants with common sense and intelligence, and somewhat broadly. These words also state clearly that the lower courts may not shield public officer defendants with a cramped, or stingy application of precedent. This latter interpretation is emphasized by the Court's rejection of the very language adopted by the Sixth Circuit. The Court wrote that the mere words "fundamentally similar" were erroneous, because a standard worded in this way "would lead trial judges to demand a degree of certainty at once unnecessarily high and likely to beget much wrangling." 117 S. Ct. at 1227. Martin emphasizes this Court's care to protect against a burden on the

plaintiff that is "unnecessarily high." The Court relies upon the term "reasonable," a term that has a commonly understood meaning among judges, public officials and citizens.

The Circuit Court fails to conform to the rule in *Lanier*. In Martin's case, the Circuit Court first sets out its general principles. It throws down a gauntlet by stating that public officials will have qualified immunity in all but "exceptional cases," and that Martin's case is particularly disfavored because it arises from his rights under the First Amendment. Only an "extraordinary" First Amendment case will survive qualified immunity. The Circuit Court asserts that Martin's speech is not protected unless he can show *both*: (a) that his speech involves a matter of public concern, and also; (b) that the value of his speech outweighs its potential for disruption of government workplace efficiency, citing *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). Martin disputes this particular assertion, as set forth below. Then the Circuit Court asserts that this "Pickering-Connick" test is fact intensive, and for that reason it is "nearly impossible for a reasonable person to predict" how a court will apply both prongs of the test. Thus, the Circuit Court concludes that a public officer will "only rarely be on notice that his actions are unlawful." This preamble having been made, Circuit Court articulates its test.

According to the Circuit Court, to show notice the plaintiff must produce a case "in which speech materially similar to his" was held to be protected, "in all Pickering-Connick respects." Read together with the Circuit Court's aggressive preamble, it is clear that this "materially similar . . . in all Pickering-Connick respects" test is exactly the same thing as the "fundamentally similar" test that was long since rejected by the Court in *Lanier*. It is clear that in setting out its test the Circuit Court is deliberately demanding a "degree of certainty

at once unnecessarily high," being higher than "reasonable," and also "likely to beget wrangling." It is also clear that in its zeal to shield public officials, the Circuit Court will not find liability "in light of pre-existing law" or where that liability is "apparent." Rather, it is apparent that the Circuit Court intends to apply precedent in a cramped, unreasonable way.

The Circuit Court's application of its test bears out this evaluation of its test, as shown by its assertion that no existing case "would make it obvious" to Baugh that Martin's speech to his city councilman was protected, and by its rejection of the district court's reliance upon *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), as a case providing notice. First of all, requiring that notice be "obvious" is a higher standard that the "apparent" or "in light of" notice described by the Court in *Lanier*. Second, the Circuit Court's rejection of *Martinez* shows how cramped its reading is. In *Martinez*, the plaintiff testified as to her superiors' failure to comply with bid procedures, just like Martin. She was promptly retaliated against by her superiors, just like Martin. The Circuit Court distinguishes *Martinez* by observing that she testified once pursuant to subpoena, without explaining why this matters. The Circuit Court glosses over the fact that Martinez also reported her findings to a "State Attorney" on a second occasion, not under subpoena. 971 F.2d at 710.

In sum, this Court holds that a public official may be liable "in light of" precedent, and where that liability is "apparent." This is a reasonableness test, somewhat broadly construed. In contrast, the Circuit Court in Martin's case requires much, much more. It fails to use a reasonableness test, but instead actually articulates a different test with words that demand unnecessary certainty, and also surrounds its test with an aggressive preamble that shows that First Amendment claims are disfavored in a way that is clearly contrary to *Lanier*. The Circuit

Court's statement of the applicable law, and its decision, are clearly in conflict with the applicable decision of this Court.

B. In addition, the Circuit Court's decision is in conflict with the reasonable person standard in *Lanier*.

As suggested above, giving special meaning to the term reasonable is a challenge. This Court does shed light on the proper application of a reasonable person test in *Lanier*. The Court wrote

> But general statements of law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful." [*Anderson v. Creighton*, 483 U.S. 635, 640 (1987)]. As Judge Daughtrey noted in her dissenting opinion in this case, " '[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability."

117 S. Ct. 1227-28. The Court also observed that

> due process requirements are not "designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."

117 S. Ct. at 1228 (quoting *Colten v. Kentucky*, 407 U.S. 104 (1972)).

These statements refer to notice to a reasonable person in the absence of specific precedent. These statements also are illuminated by the Court's summary statement that the only useful thing to be said about liability for violation of constitutional rights, is that liability must be found *in light of* precedent.

In contrast, the Circuit Court in Martin's case holds that a reasonable person couldn't know that it was unlawful to retaliate against Martin as a whistleblower, or at least as a conscientious government employee reporting to his councilman/superior. The Circuit Court so holds in spite of cases like *Martinez*, the many whistleblower laws in this country, and the decisions explaining that "statements regarding criminal misuse of public funds, wastefulness, and inefficiency in managing and operating government entities [are] matters of *inherent* public concern," *Chateaubriand v. Gaspard*, 97 F.3d 1218, 1222-23 (9th Cir. 1996) (citing *Roth v. Veterans Admin.*, 856 F.2d 1401 (9th Cir. 1988); *Voight v. Savell*, 70 F.3d 1552 (9th Cir. 1995)). The Circuit Court's blinkered application of what a reasonable person knows about the law is in stark contrast to and conflict with the common sensical, somewhat broadly construed reasonable person test in *Lanier*.

Though the Circuit Court's statements refer to the "reasonable person," its decision on the reasonable person issue is not "the misapplication of a properly stated rule of law." Rule 10, Rules of the Supreme Court. The Circuit Court actually misstates the rule of law. In its decision, the reasonable person term is qualified by the additional terms, that Martin must "make it clear to every reasonable person," that Martin's speech "must pass the *Pickering-Connick* test." The unnecessary, *emphatic* words — "clear . . . every . . . must" demonstrate that the Circuit Court expects a higher showing from the plaintiff than mere reasonableness. We can be sure that defendants will

argue that a higher showing is the import of these words. The Circuit Court also asserts that the public concern test is "intensely fact-specific" and therefor supposedly unpredictable to a reasonable person, despite the *established* idea that some matters are "matters of *inherent* public concern." *Chateaubriand*, 97 F.3d at 1222-23. In effect, the Circuit Court's reasonable person is a dullard, for whom matters of common sense must be made "clear" and "obvious." It is simply no mystery to an *actual* reasonable supervisor that it is unlawful to retaliate against a subordinate city employee who cooperates with *his own city councilman, his boss,* to expose "misuse of public funds, wastefulness, and inefficiency in managing" the city. As the district court wrote in its memorandum opinion denying the motion to dismiss,

> This court cannot say that a reasonable supervisor like Baugh who is the superior of a technical expert like Martin should not know that he crosses the constitutional divide if he punishes the technical expert for sharing with the public his views on the matter of public concern generated by this controversy.

Memorandum Opinion at 32. Thus, the Circuit Court's decision in *Martin* is also in conflict with *Lanier* with regard to the legal standard for the reasonable person test.

II.

THE CIRCUIT COURT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AND OF THE NINTH CIRCUIT WITH REGARD TO THE ELEMENTS OF WHAT IS A "CLEARLY ESTABLISHED" CONSTITUTIONAL RIGHT.

In *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996), the court recited that for the plaintiff's conduct to be protected, his speech must address a matter of public concern. 97 F.3d at 1222 (citing *Connick v. Myers*, 461 U.S. 138 (1983)). Having found that the speech was of public concern, the court held that it was protected. *Id.* at 1223. The point is, the court did not undertake any "balancing" test as to whether the value of the speech outweighed its disruptive impact, before holding that the speech was protected.

Similarly, in *Board of City Com'rs v. Umbehr*, 116 S. Ct. 2342 (1996), this Court wrote that the plaintiff must make "an initial showing" that his speech was on a matter of public concern. 116 S. Ct. at 2352. The Court then wrote that, if the plaintiff can make that showing of public concern, the defendant Board in its turn could prevail by showing that its interests outweighed the free speech interests. *Id.* Once again, the plaintiff was not required to show this balancing as part of his "initial showing" that his speech was protected.

This Court has also written that the qualified immunity analysis is "essentially a legal question." *Crawford-El v. Britton*, 117 S. Ct. 2451, 1998 WL 213193 at *9 (1998) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526-29 (1985)). This Court has also exerted itself to craft a test for qualified immunity that is essentially legal and objective, to facilitate summary judgment. *Crawford-El*, 117 S. Ct. 2451; *Harlow v. Fitzgerald*,

457 U.S. 800 (1982). In contrast, the Circuit Court points out that *Pickering-Connick* balancing is "fact-specific" and "nearly impossible for a reasonable person to predict." Clearly, the balancing analysis is incompatible with the goal of having qualified immunity be a matter of law and objectivity.

In sum, it appears that a balancing test is not, or should not, form part of qualified immunity analysis. Nevertheless, the Circuit Court uses balancing as part of its analysis of whether speech is protected, and because balancing is fact specific, the Circuit Court goes on to require the plaintiff to produce a "materially similar" case before notice is shown. The Circuit Court does not show Supreme Court authority for making the balancing analysis part of the plaintiff's burden in responding to qualified immunity.

The balancing will remain part of the plaintiff's cause of action. Martin asserts, however, that balancing is not a proper part of the defendant's affirmative defense of qualified immunity. This Court was careful to distinguish the cause of action from the affirmative defense in *Crawford-El*, after the Sixth Circuit had improperly mixed them. It appears that the Circuit Court in Martin's case has done a similar thing, leading to an improperly difficult burden on the plaintiff to show protected speech.

III.

THE CIRCUIT COURT'S DECISION IS IN CONFLICT WITH *CRAWFORD-EL*, AND THE PUBLIC POLICY UNDERLYING QUALIFIED IMMUNITY, IN THAT THE CIRCUIT COURT HAS MADE QUALIFIED IMMUNITY AN IMPROPERLY HIGH BARRIER TO FIRST AMENDMENT CLAIMS.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court acknowledged that in defining qualified immunity a balance had to be struck between the competing interests of public officials and their employees, a balance "between the evils inevitable in any available alternative." 457 U.S. at 813-814. Furthermore, this Court "emphasized" that "In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Crawford-El v. Britton*, 117 S. Ct. 2451, 1998 WL 213193, *10 (May 4, 1998).

In *Crawford-El*, this Court acted to prevent the circuit court for the District of Columbia from upsetting the balance previously struck by this Court. When that court sought to discourage frivolous claims by raising the plaintiff's burden of proof, and in a way that would impose such a burden on all plaintiffs seeking redress against government officials, this Court acted to preserve the proper balance between public officials and persons whom they have harmed.

> The reasoning in *Harlow*, like its specific holding, does not justify a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved.

1998 WL 213193 at *11.

The Court has also expressed the idea that one of the policy bases for its qualified immunity decisions is to preserve the free speech of citizens who want to prevent public corruption. For example, in *Umbehr*, the Court expresses its concern that government retaliation not "chill speech on matters of public concern by those who, because of their dealings with the government, 'are often in the best position to know what ails the agencies for which they work.' " 116 S. Ct. at 2347. Clearly, the Court wants citizens to be able to speak about public corruption, for the public good.

Thus, in *Crawford-El*, the Court wrote that the notion of fairness "does not provide any justification for the imposition of special burdens on plaintiffs who allege misconduct that was plainly unlawful when it occurred." 1998 WL 213193 at * 10.

> The reasoning in Harlow, like its specific holding, does not justify a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved.

Id. at * 11. Similarly, the Court in *Lanier* acted to eliminate an unduly restrictive rule burdening plaintiffs, as set forth above.

In sum, the Court has undertaken to protect the balance of interests against the zeal of courts to protect public officials, or to give too much rein to plaintiffs. The Court has identified and eliminated burdens that depart from the balance struck in *Harlow*.

In this case, the Circuit Court has crafted a qualified immunity law that is insurmountable. As a matter of law, it does not give reasonable scope to precedent, does not attribute reasonable knowledge and common sense to public officials,

and inserts an improper fact intensive element of balancing analysis into the analysis of whether speech is protected in order to justify its narrow reading of the cases. The Circuit Court's narrow reading of legal precedents assures that no claim can be brought — if a plaintiff must always find a narrowly similar decision to avoid summary judgment, no such decisions will ever be written, because all the claims will have been thrown out. The Circuit Court's rule creates a bootstrap problem that does not exist under *Harlow*, and is not implied by *Harlow*. Also, it would be truly ironic if the *criminal* liability of public officials under *Lanier* is routinely more broadly construed than their potential civil liability. This Court should grant the petition to address the stark conflict between its balanced decisions discussed herein and the extreme position taken by the Eleventh Circuit in Free Speech claims, with the foreseeable chilling effect on valuable speech on matters of public concern.

In this case, William Martin spoke out against corruption and the gross misapplication of public funds. More than $10,000,000 was at stake. Most of all, he had a justified fear for the lives of police officers, lest they be forced to use inferior safety equipment. He did not run to a tabloid, rather he spoke in a careful, measured way to a city councilman, and to the FOP. He did not stand to benefit personally from his speech. And before the Circuit Court wrote its opinion, Judge Acker's advisory jury came back with a verdict that William Martin was *right* — there *was* "undue or improper influence by Motorola" upon the city's decision makers. Martin was not laid off in a reduction in force, or offered early retirement. He was *harassed*, relentlessly, until he suffered from severe depression. How could it be *lawful* to harass William Martin for exposing public corruption?

CONCLUSION

It is clear that the Eleventh Circuit has departed from the guidance provided by this Court for the adjudication of claims arising from the violation of the constitutional right of freedom of speech by public officials. The Eleventh Circuit has raised an insurmountable barrier to such claims, using a form of qualified immunity analysis that is more stringent that that authorized by this Court, and that is in actual conflict with the decisions of this Court. In addition, the Eleventh Circuit's use of Pickering-Connick balancing in the context of determining whether speech is protected is in conflict with the Ninth Circuit. This case arises from an appropriate fact situation, where a government employee has spoken out to prevent the waste of millions of dollars of taxpayer money, without seeking benefit for himself, a situation that is *inherently* of public concern. Furthermore, this case has ripened at a time when the Court has recently spoken on the issues of reasonable notice, and may now properly bring the circuits into line.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 28, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6111

D. C. Docket No. CV-95-AR-0387-S

WILLIAM C. MARTIN,

Plaintiff-Appellee,

versus

VICTOR BAUGH, individually and in his official capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(April 28, 1998)

Before TJOFLAT and DUBINA, Circuit Judges, and STAGG*, Senior District Judge.

PER CURIAM:

In this case, a radio technician contends that his employer (the city of Birmingham), his supervisor, and Birmingham's mayor violated the First and Fourteenth Amendments by

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* Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

retaliating against him for his criticism of the manner in which the city awarded a contract. Seeking both legal and equitable relief, he has sued all three parties under 42 U.S.C. § 1983 (1994), the supervisor in both his official and individual capacities.

The interlocutory appeal before us is from the district court's order rejecting the supervisor's defense of qualified immunity and denying him summary judgment on the plaintiff's claim for money damages. The appeal thus presents only one question: whether the supervisor, in his individual capacity, is entitled to qualified immunity from suit under section 1983. We answer that question in the affirmative and therefore reverse the judgment of the district court.

I.

The salient facts are as follows. William C. Martin was hired by the City of Birmingham in 1979 as a communications technician in the City's Department of Communications. His job responsibilities included maintenance of the communications equipment used by Birmingham police and fire personnel. Defendant Victor Baugh was head of the Communications Department and Martin's supervisor at all times relevant to this litigation.

In the spring of 1993, Birmingham solicited bids for an upgrade of its existing communications system. Ericsson General Electric ("GE") submitted a bid in August of 1993 to install a system based on an "APCO 16" standard.[1] It was the

1. The APCO designation refers to the Associated Public-Safety Communications Officials, Inc., an organization that promulgates and reviews industry standards against which communications systems are tested.

only company to submit an APCO 16 bid. Motorola submitted a bid based on the "APCO 25" standard. Motorola was likewise the only company to submit a bid on its chosen standard. GE's bid was lower than Motorola's; the City, however, rejected both offers and then entered into private negotiations with Motorola for an APCO 25 system. Birmingham concluded a contract with Motorola in spring of 1994.

The GE-Motorola bidding process was surrounded by considerable controversy. Martin was particularly concerned that an APCO 25 system would be inferior to an APCO 16 system for Birmingham's needs. He therefore aired his opinions to a member of the Birmingham city council, Jimmy Blake, and the Birmingham chapter of the Fraternal Order of Police (the "FOP"). Martin disseminated technical information concerning the two systems to Councilman Blake and the FOP and questioned the bidding standards upon which Motorola had submitted its bid. Eventually, Martin gave sworn testimony concerning the systems in a suit between GE and Motorola that arose out of the bidding process.[2]

Martin conducted his speech activities without notifying his supervisor, Baugh. After Baugh learned of Martin's activism, he called upon Martin to answer for his conduct. Baugh told Martin he was insubordinate for "going outside the chain of command" and strongly suggested that Martin resign. Baugh also gave Martin written reprimands for his activities

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2. That suit is otherwise unrelated to this litigation. This court recently reversed the district court's decision in the case and remanded with instructions to dismiss for lack of jurisdiction. *See Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Elecs., Inc.*, 120 F.3d 216 (11th Cir.), *reh'g and suggestion for reh'g en banc denied*, 130 F.3d 446 (1997).

and assigned some of Martin's duties to another employee. As a result of his conflict with Baugh, Martin became depressed, and, on the advice of his physician, took a leave of absence.[3] He then brought this suit against the City, Mayor Richard Arrington, and Baugh.

Martin's complaint alleges that his statements to Councilman Blake and the FOP constituted speech protected by the First and Fourteenth Amendments.[4] Consequently, he alleges that when Baugh disciplined him for making those statements, Baugh exposed himself to liability in both his official and individual capacities under 42 U.S.C. § 1983. Martin claims that the City and the Mayor are answerable for Baugh's conduct, and he seeks legal and equitable relief against all three defendants. As noted *supra*, the only claim before us is Martin's damages claim against Baugh in his individual capacity.

Baugh moved the district court to dismiss Martin's claim under Federal Rule of Civil Procedure 12(b)(6) on the ground that the allegations of the complaint demonstrated that he was entitled to qualified immunity. The court denied his motion. Baugh did not appeal the court's ruling; instead, he raised his qualified immunity defense anew in a motion for summary judgment. The district court again rejected Baugh's defense, stating that "[t]his court cannot now say, any more than it was able to say on 12(b)(6) consideration, that the pertinent law

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3. The record does not indicate whether Martin is still employed by the City of Birmingham.

4. The district court dismissed Martin's original complaint for failure to state a claim for relief. The complaint referred to in this opinion is Martin's amended complaint.

was not established, or that a controlling and well-understood principle inherent in the First Amendment protected Martin's right to express himself as he did."[5] Baugh now appeals to this court under 28 U.S.C. § 1291 (1994), asserting that the district court incorrectly denied his motion for summary judgment.[6]

II.

To defeat a claim for qualified immunity, a plaintiff must show that the federal right he accuses the defendant of violating was "clearly established" when the defendant acted. *See Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996). In other words, the defendant must be on notice that his actions are unlawful. *See Beauregard v. Olson*, 84 F.3d 1402, 1404 (11th Cir. 1996) (stating that for a plaintiff's claim to survive a defense of qualified immunity, it must be "obvious to every reasonable person in [the defendant's] place that [the defendant's conduct] would violate federal law"). Martin accuses Baugh of infringing upon his First Amendment right to free speech. He must therefore show that it was "clearly established" at the time of Baugh's conduct that Martin had a constitutional right to speak

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5. The district court may have caused confusion with this statement. As discussed *infra*, the test for determining, in a case such as this, whether a motion for summary judgment based on qualified immunity should be granted is whether the plaintiff can show that it was clearly established at the time of the defendant's conduct that the plaintiff's speech was protected. In any event, we review the district court's decision *de novo*.

6. Martin challenges our jurisdiction to hear this case under *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), because there are factual issues in dispute. We refer Martin to our recent decision in *Mencer v. Board of Education*, __ F.3d __, __ (11th Cir. 1998) (holding that the court has jurisdiction to review cases in which issues of "evidence sufficiency" remain), and reject this argument.

as he did. We agree with Baugh that Martin has not carried this burden.

"[O]nly in exceptional cases will government actors have no shield against claims made against them in their individual capacities." *Lassiter v. Alabama A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994) (emphasis omitted). Martin's case is especially difficult to maintain because he bases his claim against Baugh on the First Amendment. *See Dartland v. Metropolitan Dade County*, 866 F.2d 1321, 1323 (11th Cir. 1989) (stating that the First Amendment claim that survives a defense of qualified immunity is an "extraordinary" one). As a government employee, Martin's speech is not constitutionally protected unless it passes the test set out by the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and refined in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Under *Pickering-Connick*, a plaintiff must show that 1) the speech at issue involves a matter "of public concern," and 2) the value of the speech outweighs its potential for disruption of government workplace efficiency. *See Goffer v. Marbury*, 956 F.2d 1045, 1049 (11th Cir. 1992). Because both prongs involve legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules, it is nearly impossible for a reasonable person to predict how a court will weigh the myriad factors that inform an application of the *Pickering-Connick* test. *See id.* at 1048-50 (detailing some of the "panoply of indicia" and "numerous factors" involved in the determination). Consequently, a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful. Unless the plaintiff can either produce a case in which speech materially similar to his in all *Pickering-Connick* respects was held protected, *see Lassiter*, 28 F.3d at 1149-50

("Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases."), or show that, on the facts of his case, no reasonable person could believe that both prongs of the test had *not* been met, he cannot defeat a defense of qualified immunity.

Here, Martin has failed to satisfy this court that the law was "developed in such a concrete and factually defined context" that Baugh should have known Martin's speech was constitutionally protected. *See Beauregard*, 84 F.3d at 1404. Martin points to no case, and we find none after our own search, that would have made it obvious to a person in Baugh's position that Martin's speech to Blake and the FOP was constitutionally protected.[7] Nor does Martin allege facts that, taken in a light most favorable to his claims, would make it clear to every reasonable person that his speech must pass the *Pickering-Connick* test. Thus, it was not clearly established

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7. The district court apparently considered the plaintiff's speech in *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), to be sufficiently similar to Martin's speech as to clearly establish that his speech was constitutionally protected. *Martinez*, however, is distinguishable from Martin's case. In *Martinez*, a city employee successfully sued her supervisor because she was fired for testifying before the City Board, and to an investigator from the State Attorney's office, concerning her supervisor's violations of city bidding law. The *Martinez* court, however, repeatedly emphasized the fact that Martinez' speech was *required*; she was subpoenaed to speak by the same government body that then fired her for speaking. *See id.* at 710, 712. In this case, Martin did not have to speak to Councilman Blake or the FOP; in fact, Baugh presented evidence that such communication, without prior notification to Baugh, was a violation of city policy. Thus, regardless of whether Martin's speech actually deserves protection under the First Amendment, *Martinez* did not clearly establish that it was protected before Baugh disciplined Martin.

when Baugh acted that he was violating Martin's First Amendment right.

III.

For the above reasons, we reverse the district court's judgment and direct it to grant Baugh qualified immunity from Martin's section 1983 suit.

REVERSED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 28, 1998

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6111

District Court Docket No. CV-95-AR-0387

WILLIAM C. MARTIN,

Plaintiff-Appellee,

versus

VICTOR BAUGH, individually and in his official capacity,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT and DUBINA, Circuit Judges, and STAGG*, Senior District Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

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*Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

Appendix B

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby REVERSED;

IT IS FURTHER ORDERED THAT plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: April 28, 1998
For the Court: Thomas K. Kahn, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: AUG 19 1998

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION ENTERED JANUARY 18, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No.
95-AR-0387-S

WILLIAM C. MARTIN,

Plaintiff,

v.

CITY OF BIRMINGHAM, ET AL.,

Defendants.

MEMORANDUM OPINION

This court has under submission a motion for summary judgment pursuant to Rule 56, F.R.Civ.P., filed by defendant, Victor Baugh ("Baugh"), who is a department head of defendant, City of Birmingham, sued in his individual capacity by plaintiff, William C. Martin ("Martin") , invoking 42 U.S.C. § 1983. Earlier, Baugh, also in his individual capacity, filed a motion to dismiss pursuant to Rule 12(b)(6), F.R.Civ.P. The first paragraph of Baugh's 12(b)(6) motion said:

> The complaint states no claim upon which relief can be granted against Baugh, particularly in light of Baugh's qualified immunity from suit under 42 U.S.C. § 1983.

Appendix C

This court denied Baugh's earlier motion, finding no qualified immunity. Baugh did not appeal. Perhaps Baugh doubted his right to take more than one appeal for an adverse pre-trial ruling on his qualified immunity defense. See *Behrens v. Pelletier*, Supreme Court No. 94-1244, argued in the Supreme Court on November 7, 1995. In any event, Baugh has now made clear his intention to appeal from any denial of his present Rule 56 motion despite the fact that the existence of disputed issues of pertinent fact (giving Martin the benefit of all logical inferences), in the opinion of this court, may preclude such an appeal. See *Babb v. Lake City Community College*, 66 F.3d 270 (11th Cir. 1995).

This court will briefly outline its reasons for denying Baugh's present Rule 56 motion, although the Eleventh Circuit will look at the matter *de novo* as if it were considering Baugh's motion *ab initio*.

Baugh argues with some degree of persuasive force that Martin's "speech" addressed to the Fraternal Order of Police and to Councilman Jimmy Blake was not of the classic "whistle blowing" variety and therefore was not protected by 42 U.S.C. § 1983, and that Baugh enjoys qualified immunity because, as Martin's supervisor, he had no reason to believe that his negative reaction upon learning of Martin's vocal, clandestine activities violated established constitutional norms. Baugh does not deny that he punished Martin for what Baugh perceived to be Baugh's violation of standard operating procedures at City Hall and for his acting outside of the appropriate internal channels of communication. In other words, Baugh's position was and is that Martin was insubordinate and deserved what he got.

Appendix C

It is also true, as is pointed out by Baugh, that Martin categorically denies ever having charged Baugh, or, for that matter, anybody else at City Hall, with having done anything illegal or with having committed malfeasance in their support of the efforts of Motorola to obtain a contract with the City for a new communications system in competition with Ericsson GE. Furthermore, it is true that an internal difference of opinion within a municipality's hierarchy over a technical or a financial matter does not ordinarily present a matter of constitutionally protected speech. Except in unusual circumstances such internal disagreements do not enjoy First Amendment protection.

Under Rule 56, this court not only considers the evidentiary materials submitted by the parties but takes judicial notice of the testimony of Baugh and of Martin in *Ericsson GE v. Motorola, et al.*, CV 94-AR-0808-S, which is now on appeal to the Eleventh Circuit. Giving Martin the benefit of all logical inferences from the file in CV 94-AR-0808-S and from the evidence submitted in support of and in opposition to Baugh's 56 motion, Martin's strong criticisms of the Motorola proposal, as compared to the Ericsson GE proposal, communicated by him to persons outside the chain of command, could easily have been construed or understood by his listeners to suggest something extraordinary or ominous, something beyond a mere technical difference of opinion but rather something of a kind and character to call for an investigation of Baugh, of Motorola, and/or of Hambric, the City's outside consultant, on the proposed communications system. This is apparently precisely what Martin was trying to communicate both "inside" and "outside," despite the fact that he carefully avoided exposing himself to a possible claim of slander. In this court's opinion, Martin's circuitous, subtle approach does not keep his "speech" from being of the protected variety described more fully in this

court's lengthy opinion of June 1, 1995, accompanying its denial of Baugh's 12(b)(6) motion. What he said concerned serious matters of public interest and concern. He voiced his views to entities who had access to the media and who were important to the political process within City Hall. Despite the fact that Martin's communications were framed in terms of his technical and/or financial differences of opinion with the "goings on" at City Hall, a fair interpretation of what he said to the FOP and to Blake would be the same as what the advisory jury in *Ericsson GE v. Motorola, et al.* said in response to the special interrogatory submitted to it after it heard the sworn testimony of Martin and of Baugh, among others. That interrogatory, and the jury's answer, were as follows:

Special Jury Interrogatory

> Did plaintiff, Ericsson GE Mobile Communications, Inc., prove by a preponderance of the evidence that the decision by defendant, City of Birmingham, to enter into a contract with defendant, Motorola Communications & Electronics, Inc., for a radio communications system for the City was made as a proximate consequence of undue or improper influence by Motorola Communications & Electronics, Inc., upon the City's decision makers?

Jury's Answer

YES

This court cannot now say, any more than it was able to say on 12(b)(6) consideration, that the pertinent law was not

established, or that a controlling and well-understood principle inherent in the First Amendment protected Martin's right to express himself as he did. A different answer may come from the Supreme Court when it decides the appeal from *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995), which was argued as Supreme Court No. 94-1654 on November 28, 1995.

For the foregoing reasons, which are consistent with the arguments made by Martin in opposition to Baugh's 56 motion, the said motion will be denied by separate order. All briefs on the motion not previously filed shall be filed by the Clerk.

DONE this 18th day of January, 1996.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — MOTION OF DEFENDANT VICTOR BAUGH FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION FILED NOVEMBER 17, 1995 AND DENIED JANUARY 18, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
Southern Division

CV 95-AR-387-S

WILLIAM MARTIN,

Plaintiff,

vs.

CITY OF BIRMINGHAM, et al.,

Defendants.

MOTION OF DEFENDANT VICTOR BAUGH FOR SUMMARY JUDGMENT

Defendant Victor Baugh, in his individual capacity, hereby moves pursuant to Fed. R. Civ. P. 56 for summary judgment in his favor based on qualified immunity and the other reasons set forth in the supporting brief. This motion is supported by the record in this case, including without limitation the Declaration of Victor Baugh with exhibits (Tab A hereto) and excerpts of the deposition of William Martin (Tab B hereto).

Appendix D

Respectfully submitted,

s/ Sam Heldman
Joe R. Whatley, Jr.
Sam Heldman

Cooper, Mitch, Crawford,
Kuykendall & Whatley
505 North 20th St.
1100 Financial Center
Birmingham, AL 35203
(205) 328-9576

[STAMP]
DENIED
s/ illegible 1/18/98
Judge Date

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 7, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 96-6111

WILLIAM C. MARTIN,

Plaintiff-Appellee,

versus

VICTOR BAUGH, individually and in his official capacity,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion ____, 11th Cir., 19__, __F.2d__).

Before: TJOFLAT and DUBINA, Circuit Judges, and STAGG*, Senior District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court

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* Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ illegible
UNITED STATES CIRCUIT JUDGE